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# PERSONAL TORTS

Frank L. Branson \*

## I. NEGLIGENCE

### A. DUTY

**D**URING this Survey period, Texas courts have addressed the concept of duty. In *Connell v. Payne*<sup>1</sup> the Dallas Court of Appeals held that a person involved in a competitive contact sport owes a duty not to recklessly or intentionally cause injury to other players. Likewise, the Amarillo Court of Appeals held that golfers will not be held liable for hitting another player in the head with a golf ball unless the conduct was reckless or intentional.<sup>2</sup> On the other hand, the court held that liability may be imposed on the golf course owner. The court reasoned that even in recreational areas, a possessor of land is liable for physical harm caused to invitees by a condition on the land if the possessor:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.<sup>3</sup>

The Austin Court of Appeals also held that the owner of a parasail can be held liable absent reckless or intentional conduct when someone is injured on the equipment.<sup>4</sup> The *Bangert* court distinguished *Connell v. Payne* on the grounds that parasailing is not a contact sport. The court declined to adopt the reckless disregard standard for every recreational activity or sport and held that the defendant parasail owner owed the plaintiff a duty of ordinary care in making sure that the parasail was set up properly.<sup>5</sup>

Further examining duty, the Austin Court of Appeals held that a drug-testing laboratory may be held liable to a potential employee for negligent

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1. 814 S.W.2d 486, 487-89 (Tex. App.—Dallas 1991, writ denied).

2. *Hathaway v. Tascosa*, 846 S.W.2d 614 (Tex. App.—Amarillo 1993, n.w.h.).

3. *Id.* at 617.

4. *Bangert v. Shaffner*, 848 S.W.2d 353 (Tex. App.—Austin 1993, writ denied).

5. *Id.* at 356.

drug testing.<sup>6</sup> The laboratory failed to warn the employer that test results may be inaccurate if the potential employee had ingested poppy seeds. The court of appeals rejected the defendant's arguments that it had no duty to the potential employee. The court reasoned that the laboratory created the dangerous situation by failing to provide pertinent information on the unreliability of the test results.

In *Way v. Boy Scouts of America*<sup>7</sup> a twelve-year-old boy died after the gun he was playing with accidentally discharged. Shortly before the accident, Way read a supplement on shooting sports published in Boy's Life Magazine. Applying the risk-utility balancing test, the court held that the firearms supplement did not create a duty on the part of defendants to either refrain from publishing the supplement or to add warnings about the danger of firearms and ammunition. The court noted that weighing heavily on its decision were considerations of the pervasiveness of firearms in society which gives rise to a need for the safe and responsible use of firearms by minors in conjunction with Boy Scouts and other supervised activities of significant social utility. The supplement, according to the court, provided useful information about lawful products.

In *Salinas v. General Motors Corp.*<sup>8</sup> an eighty-nine-year-old woman hit and killed a person directing traffic in a parking lot. She had purchased the car one month prior from a salesman who knew that she had previously driven her car through her garage and hit a tree. The court held that an automobile manufacturer has no duty to warn drivers or instruct dealers about the dangers of impaired or elderly drivers.<sup>9</sup>

In the area of inter-familial duties, the San Antonio Court of Appeals has held that no spousal duty exists to take affirmative action to protect the other from self-injury.<sup>10</sup> In this case a woman died after ingesting alcoholic beverages and nerve pills prior to a soak in the hot tub. The court explained that "[n]either spouse has a legal duty to intervene forcibly in the other's decision when and how much to drink, or whether or how to use a hot tub."<sup>11</sup> Although there is no liability for such non-feasance, a spouse may be liable for intentional or negligent acts resulting in injury.<sup>12</sup>

In *Apolinar v. Thompson*<sup>13</sup> a housesitter sued the homeowner alleging that the defendant had a duty to warn of dangerous conditions and/or make the premises reasonably safe. Such a duty existed in this case since the homeowner had been receiving harassing and threatening phone calls. Specifically, the court explained that the criminal act of a third party does not automatically relieve a property owner from liability.<sup>14</sup> This is particularly

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6. *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted).

7. 856 S.W.2d 230 (Tex. App.—Dallas 1993, writ denied).

8. 857 S.W.2d 944 (Tex. App.—Houston [1st Dist] 1993, n.w.h.).

9. *Id.* at 950.

10. *Rampel v. Wascher*, 845 S.W.2d 918 (Tex. App.—San Antonio 1992, writ denied).

11. *Id.* at 925.

12. *Id.*

13. 844 S.W.2d 262 (Tex. App.—San Antonio 1992, writ denied).

14. *Id.* at 264.

applicable when the property owner has failed to warn after he "knew or should have realized the likelihood"<sup>15</sup> that a dangerous "situation might be created, and that a third person might commit such a tort or crime."<sup>16</sup>

In *Coleman v. United Savings Ass'n of Texas*<sup>17</sup> the Fort Worth Court of Appeals held that a landlord has a duty to install, inspect, or repair a smoke detector in a tenant's apartment when the tenant makes the appropriate request.<sup>18</sup> The court affirmed summary judgment by focusing on the Texas Smoke Detector Statute.<sup>19</sup> The court held that summary judgment was appropriate because the deceased tenant had not given notice or made a request for the defendant to inspect his smoke detector.<sup>20</sup> The court reasoned that the Texas Smoke Detector Statute supersedes common law liability regarding smoke detectors.

## B. CAUSATION

Proximate cause means that:

cause which, in the natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be considered the proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.<sup>21</sup>

According to the court in *Maritime Overseas Corp. v. Ellis*<sup>22</sup> expert testimony concerning causation in a toxic tort case must be based on a reasonable medical probability rather than mere possibilities. In this case conclusions of the plaintiff's experts amounted to speculation because they were unsupported by scientific studies or other well-founded methodologies. Although experts relied on past experience in treating patients and published scientific studies, none of the authorities documented the exact phenomena at issue.

In *Kalteyer v. Sneed*<sup>23</sup> the plaintiffs brought a medical malpractice cause of action based upon *res ipsa loquitur*. The defendant doctor moved for summary judgment presenting two affidavits from medical experts in support of his motion. The plaintiffs offered no expert testimony in response contending that such evidence was unnecessary due to their reliance on *res ipsa loquitur*. The court of appeals stated that *res ipsa loquitur* is applied seldomly in medical malpractice cases.<sup>24</sup> Even if *res ipsa loquitur* were applied in this case, the court held the defendant was entitled to summary

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15. *Id.*

16. *Id.*

17. 846 S.W.2d 128 (Tex. App.—Fort Worth 1993, n.w.h.).

18. *Id.* at 132.

19. See TEX. PROP. CODE ANN. §§ 92.255, 92.256, 92.258, 92.259 (Vernon 1993).

20. *Coleman*, 846 S.W.2d at 132-33.

21. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 2.04 (1986) [hereinafter P.J.C.].

22. C14-91-00795-CV (Tex. App.—Houston [14th Dist] 1992, n.w.h.).

23. 837 S.W.2d 848 (Tex.App.—Austin 1992, n.w.h.) (per curiam).

24. *Id.* at 852.

judgment because the "[a]pplication of *res ipsa loquitur* would allow an inference of negligence in the absence of expert testimony that the standard of care had been breached, but it does not eliminate the need for evidence of causation."<sup>25</sup> Without any controverting proof, the defendant negated any issue of material fact regarding causation, thereby entitling him to summary judgment.

In *Neese v. Dietz*<sup>26</sup> a plaintiff brought suit against another driver who had rear-ended his car. The accident occurred after the plaintiff stopped at a yield sign, moved forward, then stopped again. Based upon the evidence, the jury found in favor of the defendant on the question of liability. The Houston Court of Appeals affirmed and held that there was sufficient evidence to support the jury's answer as to proximate cause. Specifically, the court recognized that "the mere occurrence of a rear-end automobile accident is not of itself evidence of negligence as a matter of law."<sup>27</sup> Moreover, "[t]he plaintiff must prove specific acts of negligence on the part of the following driver and must also prove proximate cause."<sup>28</sup>

### C. VICARIOUS LIABILITY

The Dallas Court of Appeals held that the president of a diagnostic center, by the mere status of his position, cannot be held personally liable for the death of a child who was mistakenly given a fatal dose of chloral hydrate.<sup>29</sup> Since the president did not have any legal duty to institute policies, procedures, and/or quality control, the court held that the president was not liable for his alleged negligent hiring of consultants and administrators.<sup>30</sup>

Four justices dissented arguing that the president could be held liable if he chose to hire a manager and consultant without sufficient experience in providing patient care.<sup>31</sup> Additionally, he had the ultimate authority to change personnel and to make decisions. The dissenters asserted that a properly instructed jury could have found the requisite foreseeability and causation.

In *Chevron, U.S.A., Inc. v. Lee*<sup>32</sup> the El Paso Court of Appeals held that an employer was liable for an employee's actions while he was on a "special mission." As part of his employment, the employee was required to attend a seminar. While on his way to the seminar, the employee was involved in an automobile accident. The court explained that an employee is in the course and scope of his employment "where an employee has undertaken a special mission at the direction of his employer or is otherwise performing a service in furtherance of the employer's business with the express or implied approval of the employer."<sup>33</sup> Moreover, the court found that a "special mis-

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25. *Id.* at 853.

26. 845 S.W.2d 311 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

27. *Id.* at 314.

28. *Id.*

29. 852 S.W.2d 578 (Tex. App.—Dallas 1993, writ denied) (en banc).

30. *Id.*

31. *Id.*

32. 847 S.W.2d 354 (Tex. App.—El Paso 1993, n.w.h.).

33. *Id.* at 356.

sion' exists when an employee . . . is travelling from his home or returning to it on a special errand either as part of his regular duties or at the specific order or request of his employer."<sup>34</sup> Accordingly, the court found that sufficient evidence existed to support a finding that this employee was acting within the course and scope of his employment.

#### D. DRAM SHOP

Addressing the duty of care owed by businesses and social hosts when serving alcoholic beverages, the Supreme Court of Texas held that social hosts do not owe a duty of care to an innocent third party, but providers of alcohol have such a duty to third parties and the drinker himself. The existence of a legal duty to protect the general public from a known inebriated motorist was first recognized in Texas by the Texas Supreme Court in *Otis Engineering Corp. v. Clark*.<sup>35</sup> The *Otis* court imposed liability on an employer who, knowing that his employee was inebriated, took no affirmative steps to prevent the employee from operating a motor vehicle.<sup>36</sup> Relying on *Otis*, many courts have analyzed, interpreted, and developed dram shop liability in Texas.<sup>37</sup>

Recently, in *Graff v. Beard*,<sup>38</sup> the Texas Supreme Court declined to impose the duty on a social host for dram shop liability. The court reasoned the legislature did not include social hosts in the dram shop statutes, thereby exempting social host cases from the long arm of the statute. Dissenting, Justice Gammage stressed that the risk created by these social hosts is foreseeable and that imposing the duty would be a logical extension of existing Texas law.

On the other hand, a commercial provider of alcohol owes a greater duty of care. The provider's liability has been expanded to include the public at large and the drinker himself.<sup>39</sup> The Texas Supreme Court reasoned that liability under the Dram Shop Act "is premised on the conduct of the provider of the alcoholic beverages — not the conduct of the recipient or a third party. The conduct for which the provider may be held liable under Chapter 2 [of the Dram Shop Act] is the same conduct regardless of whether the intoxicated individual injures himself or a third party."<sup>40</sup> Thus, an individual or entity who provides, sells, or serves alcoholic beverages in violation of Chapter 2 of the Alcoholic Beverage Code of the Dram Shop Act may assert a cause of action against the provider even if he injures only himself. Logically, the heirs and beneficiaries of a decedent who kills himself may sue the alcohol provider under the wrongful death and survival statutes.

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34. *Id.*

35. 668 S.W.2d 307 (Tex. 1983).

36. *Id.*

37. See *El Chico Corp. v. Poole*, 732 S.W.2d 307 (Tex. 1987); *Pinkham v. Apple Computer, Inc.*, 699 S.W.2d 387, 389-90 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.); *Poole v. El Chico Corp.*, 713 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

38. 858 S.W.2d 918 (Tex. 1993).

39. *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993).

40. *Id.* at 354.

In *Fuller v. Maxus Energy Corp.*<sup>41</sup> the Waco Court of Appeals held that a provider of alcohol may be held liable for providing alcohol to a person eighteen years old or older if it was apparent to the provider that the person was intoxicated at the time the alcohol was provided. In this case an eighteen-year-old soldier purchased beer at a service station where the store clerk did not check any identification. Several hours later, the soldier's vehicle struck and killed two other soldiers. The trial court granted summary judgment based on evidence that the soldier was not intoxicated when he purchased the beer. Since there was no evidence of intoxication at the time of the purchase of the alcohol, the trial court's decision to grant summary judgment was affirmed.<sup>42</sup>

#### E. CRIMINAL CONDUCT BY A THIRD PARTY

In *Stephens v. Crowder*<sup>43</sup> after the owner had left the keys in the vehicle, a twelve-year old stole the car and caused a wreck. The automobile owner was not entitled to summary judgment since a trier of fact must determine whether it was foreseeable that the vehicle might be stolen. Since no evidence was presented as to whether similar thefts or other criminal acts had occurred in the area, the defendants failed to negate the foreseeability element of negligence, thereby precluding any entitlement to summary judgment.

#### F. NEGLIGENCE — DEFENSES

Until recently, the Texas automobile insurance coverage contained a mandatory family member exclusion. During the Survey period, however, the Texas Supreme Court struck down the family member exclusion as void against public policy.<sup>44</sup> The court reasoned that the family member exclusion conflicts with the Texas Safety Responsibility Act as well as public policy underlying the act.<sup>45</sup>

In *Hall v. Martin*<sup>46</sup> a minor filed suit against her mother, father, and step-father after she was injured in a motorcycle accident. Although the parents gave the minor permission to ride a moped, the minor decided to ride as a

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41. 841 S.W.2d 881 (Tex. App.—Waco 1992, no writ).

42. *Id.* at 883 (citing TEX. ALCO. BEV. CODE ANN. §§ 2.02-2.03). Chapter Two of the Alcoholic Beverage Code (the "Dramshop Act") provides an exclusive remedy for damages based on the sale of alcohol to a person eighteen years or older, and it provides a cause of action against a provider of alcohol when "it is apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered."

43. 841 S.W.2d 947 (Tex. App.—Waco 1992, no writ).

44. *National County Mut. Fire Ins. Co. v. Randall Johnson*, 37 Tex. Sup. Ct. J. 75 (Oct. 27, 1993).

45. *Id.* The Texas Safety Responsibility Act requires that a driver carry minimum liability limits of \$20,000 for bodily injury or death of one person in any accident and \$40,000 because of bodily injury or death to two or more persons in any accident and \$15,000 because of injury or destruction of property of others in any single accident. TEX. REV. CIV. STAT. ANN. art. 6701h § 1(10) (Vernon Supp. 1993).

46. 851 S.W.2d 905 (Tex. App.—Beaumont 1993, writ denied).

passenger on a motorcycle. While riding on the motorcycle, the minor was injured. Based on these facts, the parents argued that they were "covered under the doctrine of parental immunity and that they had no duty and breached no duty, and the accident was not the proximate cause of any act or conduct on their part."<sup>47</sup> The Beaumont Court of Appeals agreed with this position. Specifically, the court stated that generally "[p]arental immunity is the law in Texas."<sup>48</sup> The court acknowledged that there are exceptions to the parental immunity doctrine such as:

1. Parental immunity does not apply when a parent commits a willful, malicious, or intentional wrong against a child or abandons or abdicates his parental responsibility and thereby subjects himself or herself to liability.
2. Texas does not apply the parental immunity doctrine when the act complained of arises outside of a normal family relationship of a parent to a child, such as a business activity in which the child is the employee and the parent is the employer.
3. The third exception to the parental immunity doctrine allows a child to recover against a negligent parent for damages caused by the negligent parent in operating a motor vehicle.<sup>49</sup>

Accordingly, in this case, parental immunity barred the child's cause of action.

## II. PREMISES LIABILITY

### A. LEGISLATIVE DEVELOPMENTS

The Texas legislature recently passed legislation creating new duties relating to certain rental dwellings.<sup>50</sup> This legislation went into effect on September 1, 1993. As a result, landlords now have the duty to install certain security devices even before a tenant makes such a request. For example, a landlord must install window latches on exterior windows, as well as install door knob locks or keyed dead bolts on each exterior door.<sup>51</sup>

In addition, a landlord must install "a sliding door pin lock, a sliding door handle latch, *or* a sliding door security bar on each exterior sliding glass door of the dwelling, if construction of the dwelling was completed on or after September 1, 1993, or the calendar date is before January 1, 1995."<sup>52</sup> If construction of the dwelling was completed on or after September 1, 1993, or the calendar date is January 1, 1995, or later, the landlord must install a sliding door pin lock *and* a sliding door handle latch *or* a sliding door security bar on each exterior sliding door.<sup>53</sup> Moreover, a landlord must install a

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47. *Id.* at 908.

48. *Id.* at 909.

49. *Id.*

50. Act of May 30, 1993, 73d Leg., R.S., ch. 357, 1993 Tex. Sess. Law Serv. § 1 (Vernon) (to be codified at TEX. PROP. CODE ANN. § 92.001) (Vernon 1993).

51. *Id.* § 92.153(1)-(2).

52. *Id.* § 92.153(3).

53. *Id.* § 92.153(4).



peep hole/door viewer on each exterior door of a dwelling built after September 1, 1993.

Additionally, a landlord has the duty to rekey any security device at the landlord's expense not later than the seventh day after each tenant turnover date.<sup>54</sup> The landlord is also required to make any additional changes in existing security devices at the tenant's expense, if so requested by the tenant.<sup>55</sup> Furthermore, the landlord has the duty to repair or replace a security device on request or notification by the tenant that the device is not working or in need of repair or replacement.<sup>56</sup>

The legislature also has specified that a landlord must comply with a tenant's request for rekeying, changing, installing, repairing, or replacing a security device under this section within a reasonable time.<sup>57</sup> In some situations, a reasonable time period is presumed to be not later than seventy-two hours after the request. This occurs, for example, in situations where the tenant's request followed an unauthorized entry or crime of personal violence which occurred within the tenant's apartment complex.<sup>58</sup>

## B. CASE LAW

An unavoidable accident instruction is improper in almost all premises liability cases. In *Hill v. Winn Dixie*<sup>59</sup> the plaintiff slipped and fell on a cookie in the defendant's store, and the trial court submitted a jury instruction defining unavoidable accident. "An unavoidable accident instruction is proper only when there is evidence that the event was proximately caused by a nonhuman condition and not by the negligence of any party to the event."<sup>60</sup> The Texas Supreme Court held that submission of an unavoidable accident instruction was error because there was no affirmative evidence that the cookie was on the floor as the result of any extrinsic, unavoidable event such as an act of God.<sup>61</sup>

In *Missouri Pacific Railroad Co. v. Buenrostro*<sup>62</sup> the railroad leased a portion of a right of way to a telecommunications company which hired a sub-contractor to clear the land. The sub-contractor was injured on the property and filed suit against the railroad company. The San Antonio Court of Appeals adopted the definition of possession of land contained in the Restatement (Second) of Torts § 328e and held that the railroad did not have possession of the land. The railroad company's only rights were to have the ongoing rail transportation activities on the right of way. Since this control was insufficient to constitute possession, the railroad did not have a duty of

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54. *Id.* § 92.156(a).

55. *Id.* § 92.156(b).

56. *Id.* § 92.158.

57. *Id.* § 92.161(a).

58. *Id.* § 92.161(c).

59. 849 S.W.2d 802 (Tex. 1992).

60. *Id.* at 803.

61. *Id.* Nevertheless, the court held that under the circumstances of this particular case the error was not reversible. *Id.*

62. 853 S.W.2d 66 (Tex. App.—San Antonio 1993, writ denied).

care with respect to that portion of the right of way. As a result, the plaintiff was not entitled to recover against the railroad under a premises liability theory.<sup>63</sup>

The San Antonio Court of Appeals held that a person who had been kidnapped and raped upon returning to her car may recover from the owner of the parking lot where the car was located.<sup>64</sup> The parking lot operator may be liable for criminal activity that occurs in the parking lot if the operator knew or had reason to know that criminal acts were likely to occur on or near the property.<sup>65</sup> The injury must be of such a general character as might reasonably have been anticipated. It is not required that the particular accident complained of should have been foreseen.<sup>66</sup>

On the other hand, unforeseeable criminal activity may relieve the landowner of liability.<sup>67</sup> In *Graham* the plaintiff alleged sexual harassment and sued the defendant, claiming that the company owed her a duty to maintain a work environment free of sexual harassment. The court of appeals held that a superseding and unforeseeable act will relieve the landowner of liability. Since the defendant company had no reason to believe that sexual harassment would likely occur by this individual employee, no duty existed.<sup>68</sup>

### III. PROFESSIONAL NEGLIGENCE

#### A. MEDICAL MALPRACTICE REFORM

Senate Bill 1409 became effective as of September 1, 1993, and supplemented and extended the Medical Liability and Insurance Improvement Act<sup>69</sup> to August 31, 2009.<sup>70</sup> Among the supplementations are new procedural requirements and arbitration requirements.<sup>71</sup>

Under the new statute, the plaintiff must either post a \$2,000 bond with the court to cover costs or file, within 90 days of filing a medical malpractice action, an affidavit attesting that an expert in the appropriate field has been consulted and has concluded that the defendant was negligent and proximately caused the plaintiff's injuries. Failure to comply with one of these options will result in an increased bond requirement of \$4,000 or dismissal of the complaint without prejudice, costs adjudged against the plaintiff.

Additionally, Section 13.02 directs the Texas Supreme Court to appoint six people to a Health Care Liability Discovery Panel established to promulgate standard sets of interrogatories and requests for document production.

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63. *Id.* at 80.

64. *Kendrick v. Allright Parking Tex., Inc.*, 846 S.W.2d 453 (Tex. App.—San Antonio 1992, writ denied).

65. *Id.* at 457.

66. *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 551 (Tex. 1985); RESTATEMENT (SECOND) OF TORTS § 448 (1965).

67. *Graham v. Atlantic Richfield Co.*, 848 S.W.2d 747 (Tex. App.—Corpus Christi 1993, writ denied).

68. *Id.* at 753.

69. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon 1993).

70. *Id.* §§ 13.01-.02.

71. *Id.* §§ 13.01-.02, 15.01.

The Texas Supreme Court has until January 1, 1994, to approve, disapprove, or modify the standardized documents. If disapproved, or if the panel rejects any modifications, the proposals will be null and void and the panel dissolved. If approved and published, all parties to a medical malpractice action filed after April 4, 1994 will be required to respond to the standard interrogatories and requests for production. Failure to do so will be sanctionable. Non-duplicative discovery will still be allowed.

Concerning arbitration, all agreements to arbitrate health care liability claims must include the following notice in 12 point boldface type:

**UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING AN ATTORNEY.**

Failure to meet the requirements will invalidate the arbitration clause.

#### B. MEDICAL MALPRACTICE — DUTY

In *Jaime v. St. Joseph Hospital Foundation*<sup>72</sup> a patient received a blood transfusion at the defendant hospital and later contracted AIDS. The Houston Court of Appeals upheld summary judgment for the defendant hospital since the evidence demonstrated that the hospital met the standard of care at the time of the 1982 blood transfusion in dispute.

In *Hand v. Tavera*<sup>73</sup> the plaintiff went to the Humana Hospital's emergency room complaining of a three-day headache. Pursuant to hospital policy, the emergency room physician consulted with another doctor. The consulting doctor refused to admit the patient. Shortly thereafter, the plaintiff suffered a stroke. The court of appeals reversed summary judgment finding that a physician-patient relationship existed. The court held that "when . . . the plan's doctor on call is consulted about treatment or admission, there is a physician-patient relationship between the doctor and the insured" and "the doctor owes the patient a duty of care."<sup>74</sup>

In *Pope v. St. John*<sup>75</sup> the Austin Court of Appeals held that a doctor assumes a legal duty to act with ordinary care regardless of whether he voluntarily undertakes this duty. In this case a man came to a medical center seeking medical relief. The emergency room doctor contacted the on-call internist who recommended that the patient be referred to another hospital with a neurosurgeon. The other hospital refused to admit the man. The following day, the man was diagnosed with having meningitis. The man sued the on-call internist alleging that his negligence was a proximate cause of his suffering and disabilities. The court of appeals acknowledged that at

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72. 853 S.W.2d 604 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

73. No. 04-92-00618-CV (Tex. App.—San Antonio 1993, n.w.h.).

74. *Id.*

75. 862 S.W.2d 657 (Tex. App.—Austin 1993, writ requested).

common law "a physician is liable for malpractice or negligence only where there is a physician/patient relationship as a result of a contract, express or implied . . ." <sup>76</sup> The court rejected the defendant's argument that he owed a duty only to those with whom he contracted. In this case, evidence was presented showing that the doctor failed to perform his duties with ordinary care, which resulted in misidentification of the plaintiff's ailment. Accordingly, the court held the doctor had a duty to act as a reasonable and prudent person would act under the same or similar circumstances regardless of any contractual relationship. <sup>77</sup>

In *Lopez v. Aziz* <sup>78</sup> a patient's surviving husband and children brought a medical malpractice action against an obstetrician who had consulted with the patient's treating physician. This patient was admitted to a hospital and was under the supervision of her treating physician while she awaited the delivery of her eleventh child. During this time, her treating physician consulted by telephone with an OB-GYN specialist. Following his conversations with this specialist, the treating physician acted upon the advice he had been given. Within the next day or two, complications developed and an emergency cesarean section was performed after which the patient soon died. In light of the facts of this case, the San Antonio Court of Appeals held that the trial court properly granted summary judgment in favor of the obstetrician. <sup>79</sup> The court must determine whether a physician patient relationship existed and whether this obstetrician owed any legal duty to Mrs. Lopez. The court considered the following facts: the treating physician had not contracted with this obstetrician to perform any services for Mrs. Lopez, he did not conduct any laboratory tests, he did not review any test results, he did not prepare any reports, and he did not bill Mrs. Lopez or the treating physician. The court concluded that the obstetrician did nothing more than answer professional questions posed to him by a colleague. Specifically, the court stated, "[t]o expose physicians such as . . . [this defendant obstetrician] to liability for simply conferring with a colleague would be detrimental in the long run to those seeking competent medical attention and is contrary to the public policy of this state." <sup>80</sup> Lastly, the court focused on the fact that the treating physician was ultimately responsible for the treatment of Mrs. Lopez and was not bound to accept or follow the opinions of the consulting doctor.

### C. MEDICAL MALPRACTICE — EXPERT TESTIMONY

In *St. Paul Medical Center v. Cecil* <sup>81</sup> a negligence action was brought against the attending physician and a hospital. The jury found that the negligence of the nurse and hospital proximately caused the child to become brain damaged. On appeal, the defendants argued that no standard of care

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76. *Id.* at 658.

77. *Id.* at 660.

78. 852 S.W.2d 303 (Tex. App.—San Antonio 1993, n.w.h.).

79. *Id.* at 305.

80. *Id.* at 307.

81. 842 S.W.2d 808 (Tex. App.—Dallas 1992, no writ).

was established which resulted in the jury's findings being based on conjecture. The Dallas Court of Appeals, however, rejected such arguments and explained:

In medical malpractice cases, breach of duty normally is established through expert testimony that the health care provided fell below the standard of care applicable to the medical practice in question . . . .

However, the standard of non-medical, administrative, ministerial, or routine care at a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard.<sup>82</sup>

Lastly, the court held "that expert testimony was not necessary to establish that the hospital was negligent in retaining, supervising, and assigning the nurse."<sup>83</sup>

#### D. MEDICAL MALPRACTICE — LACK OF INFORMED CONSENT

In *Greene v. Thiet*<sup>84</sup> the San Antonio Court of Appeals held that a doctor is not liable for failing to disclose a risk to a patient if the non-disclosed risk did not cause injury. The patient originally brought suit alleging that her doctors failed to inform her of the increased risk of complications from simultaneous surgeries. The court of appeals explained that in a medical malpractice action premised on the lack of informed consent, the plaintiff must prove that a reasonable person would have refused the treatment or that informing the patient of the inherent risks would influence such a decision and that the ultimate injury was caused by the undisclosed risk. As a result, the court reasoned that "the defendant-physician's failure to disclose is not a cause of the patient's injury if the patient was not injured by the occurrence of the risk of which he was not informed."<sup>85</sup>

#### E. LEGAL MALPRACTICE

In *Maxey v. Morrison*<sup>86</sup> the Corpus Christi Court of Appeals defined the elements of legal malpractice occurring during an appeal. Specifically, appellant sued his former attorney after his appeal in another action had been dismissed for want of prosecution. The court held that "[i]n an appellate legal malpractice suit, the claimant is required to prove that, but for the attorney's negligence, he would have prevailed on the appeal."<sup>87</sup>

In *Rhodes v. Batilla*<sup>88</sup> a Houston Court of Appeals defined the standard of care applied in a legal malpractice case. The court of appeals stated that

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82. *Id.* at 812.

83. *Id.* at 813.

84. 846 S.W.2d 26 (Tex. App.—San Antonio 1992, writ denied), modified, No. 04-92-00154-CV (Tex. App.—San Antonio January 13, 1993, n.w.h.) (Even though the plaintiff's denial of being informed of increased risk probably raises a fact issue on the breach of duty to inform element, disposition of the case on the proximate cause element renders such fact issue immaterial).

85. *Id.* at 30.

86. 843 S.W.2d 768 (Tex. App.—Corpus Christi 1992, writ denied).

87. *Id.* at 770.

88. 848 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

generally "[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney, based on the information the attorney has at the time of the alleged act of negligence."<sup>89</sup> In this case the defendant attorney held himself out as a "tax expert." Accordingly, the court of appeals held that the trial court properly instructed the jury that this attorney should be held "to the standard of care which would be exercised by a reasonably prudent tax attorney."<sup>90</sup>

In *American Centennial Insurance v. Canal Insurance*<sup>91</sup> the Texas Supreme Court determined whether an excess insurance carrier has a cause of action for mishandling litigation and/or violating the Stowers Doctrine against a primary carrier and the attorneys it hired. In addressing this issue, the Texas Supreme Court recognized that "Texas law vests a clear right in the insured to sue the primary carrier for a wrongful refusal to settle a claim within the limits of the policy."<sup>92</sup> Likewise, an excess insurer stands in the shoes of the insured and may bring an equitable subrogation action against the primary carrier.<sup>93</sup> Without the doctrine of equitable subrogation, an excess insurer, having paid the claim against its insured to avoid breaching its own Stowers duty, would have no recourse against the primary insurer or its agents for tortious conduct in handling the claim. Thus, "[a]llowing the excess insurer to enforce the primary insurer's duty to settle in good faith serves the public and judicial interest in fair and reasonable settlements of lawsuits by discouraging primary carriers from gambling with the excess carrier's money when potential judgments approach the primary insurer's policy limits."<sup>94</sup> Accordingly, the excess insurer may seek damages under common law, the Texas Deceptive Trade Practices Act, and/or the Insurance Code for breach of the duty of good faith and fair dealing, breach of the Stowers duty, and/or tortiously handling the underlying cause of action.<sup>95</sup>

The Texas Supreme Court also considered whether a non-client, excess insurance carrier could bring a malpractice action against the attorneys hired by the primary insurer.<sup>96</sup> After considering this issue, the court explained that "considerations that have resulted in our recognizing an excess carrier's right to bring an equitable subrogation action against the primary insurer offer similar support for an action by the excess carrier against de-

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89. *Id.* at 843.

90. *Id.*

91. 843 S.W.2d 480 (Tex. 1992).

92. *Id.* at 482.

93. *Id.* at 483.

94. *Id.* at 483 (quoting *Commercial Union Ins. Co. v. Medical Protective Co.*, 393 N.W.2d 479, 483 (Mich. 1986)).

95. See *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 134 (Tex. 1988) (the insurer's breach of the duty of good faith and fair dealing may result in recovery under the Texas Deceptive Trade Practices Act); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (violating the Stowers duty results in a violation of the Texas Deceptive Trade Practices Act and the Insurance Code).

96. *American Centennial*, 843 S.W.2d at 484; *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1988) (insurer and its agents, such as attorneys, are liable for tortiously handling a claim and/or violation of the Stowers Doctrine).

fense counsel."<sup>97</sup> Accordingly, the Texas Supreme Court abolished the privity requirement and permitted suit against the defense attorneys.

In contrast, the Houston Court of Appeals declined to abolish the privity requirement to permit suit by a third-party beneficiary of an attorney-client relationship.<sup>98</sup> The defendant attorneys represented several members of testator's family and companies owned by the family. The most significant asset in the estate was the stock of one of the family owned corporations. According to the beneficiaries, the trustee and the attorneys unsuccessfully attempted to defraud the beneficiaries into selling their stock for book value. The beneficiaries filed suit against the attorneys. The trial court granted summary judgment for defendants and the court of appeals affirmed. The court of appeals held that the plaintiffs, as beneficiaries of the estate, had no cause of action against the attorneys because no attorney-client relationship existed.<sup>99</sup> Although the court acknowledged that a fiduciary relationship may sometimes exist between the beneficiary of a trust and the trustee, such a relationship did not exist in the instant case.

#### IV. PRODUCTS LIABILITY

##### A. LEGISLATIVE DEVELOPMENTS

As of September 1, 1993, products liability legislation went into effect in Texas. Section 82.002 of the Texas Civil Practices and Remedies Code imposes a duty on manufacturers to indemnify innocent sellers against financial loss resulting from products liability causes of action. Additionally, the legislation eliminates liability where the product at issue was inherently unsafe or a common consumer product intended for personal consumption. The personal consumption section covers items such as sugar, tobacco, and butter. In a design defects case, § 82.005 requires the plaintiff to prove that there was a safer alternative design which was economically and logistically feasible.

As the recipients of special consideration by the legislature, manufacturers of firearms and ammunition will be protected against having to defend products liability cases which are based simply on the argument that the risks versus the benefits of firearms proves that liability should fall on the manufacturer. Section 82.006 mandates that such arguments will not establish the requisite proof.

Unless otherwise guaranteed by the manufacturer, all products liability causes of action must be brought within 15 years of the date of sale.

##### B. PRODUCTS LIABILITY — DUTY

In *Rolen v. Burroughs Wellcome Co.*<sup>100</sup> the Waco Court of Appeals de-

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97. *American Centennial*, 843 S.W.2d at 484.

98. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

99. *Id.* at 620.

100. 856 S.W.2d 607 (Tex. App.—Waco 1993, writ denied).

fined the duty that a drug manufacturer owes to potential users of one of its products. In this case a patient suffered an allergic reaction to a drug prescribed by his doctor. The patient sued the drug manufacturer claiming it failed to adequately warn him of the dangers associated with this drug. The court recognized that a drug manufacturer has a duty to adequately warn the doctor of the dangers associated with the drugs it markets, but the manufacturer has no such duty to warn the patient.<sup>101</sup> In turn, the doctor assumes this duty to warn the patient of the dangers associated with the prescribed drug.<sup>102</sup> In light of this legal reasoning, the court of appeals affirmed summary judgment for the defendant drug manufacturer.

## V. PUNITIVE DAMAGES

### A. STANDARDS FOR AWARDING PUNITIVE DAMAGES

Since the Code of Hammurabi of approximately 2,000 B.C., Hittite law around 1400 B.C., and the Hindu Code of approximately 200 B.C., civilizations have imposed civil penalties and damages for reprehensible or quasi-criminal conduct.<sup>103</sup> Like its ancient counterparts, modern jurisprudence authorizes the imposition of exemplary damages to deter and punish intentional or conscious conduct beyond the standard of ordinary negligence.<sup>104</sup>

Texas courts have consistently imposed punitive damages for conduct which is wilful, wanton, malicious, or the result of actual conscious indifference to the rights, safety, and/or welfare of the injured person or general public.<sup>105</sup> In addition, punitive damages are intended to reimburse the plaintiff for remote losses such as inconvenience and attorneys' fees.<sup>106</sup>

101. *Id.* at 609.

102. *Id.*

103. K. REDDEN, PUNITIVE DAMAGES § 2.2(a)(1) (1980).

104. *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784); *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (when determining punitive damages, the jury is instructed to consider the gravity of the wrong and the need to deter similar conduct); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927) (imposing punitive damages upon a corporation when its agents commit intentional fraud creates a strong incentive for vigilance by those in a position to guard against the evil to be prevented); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (punitive damages achieve the important societal goals of punishment and deterrence).

105. See, e.g., *Lunsford v. Morris*, 746 S.W.2d 471, 471-72 (Tex. 1988) (punitive damages are also assessed to deter future misconduct, punish wrongdoers, and to reimburse the plaintiff for remote losses); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985) (punitive damages are intended to punish the defendant and set an example for others); *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984) (punitive damages punish and deter similar wrongful conduct); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981) (punitive damages punish and deter malicious, fraudulent, or grossly negligent conduct); *Armco Steel Corp. v. Jones*, 376 S.W.2d 825, 831 (Tex. 1964) (deterrence and punishment are achieved by the imposition of punitive damages); see also TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1993) (gross negligence is defined as "such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person or persons affected").

106. *Lunsford v. Morris*, 746 S.W.2d 471, 471-72 (Tex. 1988); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555-56 (Tex. 1985); *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984); *Browning-Ferris Indus. Inc., v. Lieck*, 845 S.W.2d 926, 946 (Tex. App.—Corpus Christi 1992, writ granted); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 209 (Tex. App.—Corpus Christi 1990, no writ). Thus, punitive damages are intended not only to deter and punish the



Texas jurisprudence distinguishes ordinary negligence from gross negligence based upon the mental attitude of the defendant.<sup>107</sup> Unlike the case in chief where the focus is on the plaintiff, the evidence must focus squarely on the defendant's conduct in order to prove punitive damages. State of mind may be inferred from the defendant's acts or omissions.<sup>108</sup> The Texas Supreme Court is considering whether the *Burk Royalty* standard should be affirmed, modified, or overruled.<sup>109</sup>

Punitive damages may also be assessed against a corporation or principal because of an act of an agent if: (a) the principal authorized the doing and the manner of the act; (b) the agent was unfit and the principal was reckless in appointing him; (c) the agent was employed in a managerial capacity and was acting in the scope of employment; or (d) the employer or a manager of the employer ratified or approved the act.<sup>110</sup> Texas law also imposes punitive damages for a breach of a non-delegable duty. Some non-delegable duties include, but are not limited to: (1) the duty to provide rules and regulations for the safety of employees and to warn them, under certain conditions, of the hazard of their position; (2) the duty to furnish reasonable safe machinery and/or instrumentality with which servants are to labor; (3) the duty to furnish its servants with a reasonably safe work place; and (4) the duty to exercise ordinary care in selecting careful and competent fellow servants or co-employees.<sup>111</sup> A breach of one of those duties does not require

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wrongdoer but to compensate the plaintiff's additional remote losses which are too remote to be considered as elements of strict compensation.

107. *Aluminum Co. of Am. v. Alm*, 785 S.W.2d 137, 140 (Tex. 1990) (the plaintiff is entitled to punitive damages when he shows that the defendant was consciously and knowingly indifferent to his rights, welfare and safety), *cert. denied*, 498 U.S. 847 (1990); *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987) (evidence of the defendant's subjective knowledge of the peril created by his conduct is admissible to prove gross negligence); *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 573 (Tex. 1985) ("conscious indifference" denotes a decision, in the face of impending harm to another party, not to care about the consequences of the act which may ultimately lead to that harm); *International Armament Corp. v. King*, 686 S.W.2d 595 (Tex. 1985); *Burk Royalty Co.*, 616 S.W.2d at 922 (the plaintiff must show the defendant knew about the peril but that his acts or omissions demonstrate a want of care); *John Deere Co. v. May*, 773 S.W.2d 369, 373 (Tex. App.—Waco 1989, writ denied); *Terminix, Inc. v. Right Away Foods Corp.*, 771 S.W.2d 675, 681 (Tex. App.—Corpus Christi 1989, writ denied) (the plaintiff may prove gross negligence by showing that the defendant had actual knowledge that his conduct created an unreasonable degree of risk, or that under the surrounding circumstances a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others); *American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 657-58 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (the defendant's state of mind distinguishes gross negligence from negligence).

108. *Burk Royalty*, 616 S.W.2d at 922.

109. *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144 (Tex. App.—El Paso 1991, writ granted); *Granite Constr. Co. v. Mendoza*, 816 S.W.2d 756 (Tex. App.—Dallas 1991, writ denied).

110. *King v. McGuff*, 149 Tex. 432, 234 S.W.2d 403, 405 (1950); *Hylander v. Groendyke Transp., Inc.*, 732 S.W.2d 692, 695 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *Southern Pac. Transp. Co. v. Harlow*, 729 S.W.2d 946, 952 (Tex. App.—Corpus Christi 1987, writ denied); *Missouri Pac. Ry. Co. v. Dawson*, 662 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

111. *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 926 (Tex. App.—Houston [1st Dist.] 1988, no writ); see *Fort Worth Elevator Co. v. Russell*, 123 Tex. 128, 135-36, 70 S.W.2d 397, 401 (1934).

ratification.<sup>112</sup> Accordingly, a corporation may be subject to punitive damages for the acts and/or omissions of its servants and/or vice-principals for breach of non-delegable duties whether or not such duties have been ratified.

#### B. PROVING PUNITIVE DAMAGES BY A PREPONDERANCE OF THE EVIDENCE

In Texas punitive damages may be awarded if the plaintiff proves fraud, malice, or gross negligence by a preponderance of the evidence.<sup>113</sup> Regardless of the standard applied, the jury has discretion, although not unbridled, to assess punitive damages in an amount it determines is reasonable under the circumstances and in accordance with the proper instructions of the trial court. This decision is reviewable to determine whether the award comports with due process.<sup>114</sup> Additionally, the courts must determine whether the punitive damage award satisfies the five factors set forth in *Alamo National Bank v. Kraus*:<sup>115</sup> (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the defendant's conduct offends the public's sense of justice and propriety.

Applying the *Alamo* test, the Corpus Christi Court of Appeals recently affirmed a punitive damage award which was three times greater than actual damages. In *Greater Houston Transportation v. Zrubeck*<sup>116</sup> the jury awarded a fifty-three-year-old quadriplegic \$175,000 in actual damages and \$500,000 in exemplary damages when the defendant transportation company failed to restrain the plaintiff in his wheelchair with a seat belt.<sup>117</sup> While considering the reasonableness of the award, the Corpus Christi Court of Appeals stated:

Exemplary damages primarily serve to punish the wrongdoer and to provide an example to other potential wrongdoers. . . . Thus, the fairness of the award from the standpoint of the injured party is but a secondary consideration. . . . The determination of the amount of exemplary damages to be awarded should depend upon the facts of a case and remain largely within the sound discretion of the jury.<sup>118</sup>

The court also applied the *Alamo* factors and held that the punitive damage award was reasonably proportional to the actual damages.<sup>119</sup> Prior courts

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112. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 923-24 (Tex. 1981); *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 926 (Tex. App.—Houston [1st Dist.] 1988, no writ).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1993); *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 926, 946 (Tex. App.—Corpus Christi 1992, writ granted) (due process does not require a higher standard of proof than preponderance of the evidence); *Lawson-Avila Constr., Inc. v. Stoutamire*, 791 S.W.2d 584, 593 (Tex. App.—San Antonio 1990, writ denied); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986), writ granted on other grounds and vacated, 754 S.W.2d 646 (Tex. 1988).

114. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

115. 616 S.W.2d 908, 910 (Tex. 1981).

116. 850 S.W.2d 579 (Tex. App.—Corpus Christi 1993, writ denied).

117. *Id.* at 581.

118. *Id.*

119. *Id.* at 593.

have held that such a proportion was reasonable in other cases.<sup>120</sup> In addition, even if the ratio had been greater than three-to-one, the court stated that it still would have reached the same conclusion applying the five *Alamo* factors.

### C. CONSTITUTIONALITY OF PUNITIVE DAMAGES

The jury's right to award punitive damages has withstood constitutional challenges on both the state and federal level.<sup>121</sup> In those cases, the defendants asserted that the punitive damage awards violated the due process clause of the Fourteenth Amendment and the prohibition against excessive fines contained in the Eighth Amendment and their state counterparts.

Under constitutional scrutiny, the United States Supreme Court has held that punitive damage awards will not violate the due process clause of the Fourteenth Amendment as long as the jury does not have unlimited or unbridled discretion in setting the award.<sup>122</sup> In *Haslip* the Court reviewed Alabama law in connection with a judgment for over \$1,000,000 which included a punitive damages award of more than four times the amount awarded as compensatory damages, and more than 200 times the out-of-pocket expenses of the employee who was awarded the largest amount. The court determined that Alabama's scheme for awarding punitive damages did not violate the Fourteenth Amendment because the jury was instructed that punitive damages were not to compensate the plaintiff for any injury but were intended to punish the defendant and protect the public by deterring such acts. As a result, the jury properly exercised its discretion by awarding an appropriate amount of damages for the purpose in which it had been instructed.<sup>123</sup> The Court noted that unbridled jury discretion, without sufficient safeguards, "may invite extreme results that jar one's constitutional sensibilities."<sup>124</sup>

In *TXO Production Corp. v. Alliance Resources Corp.*<sup>125</sup> the United States Supreme Court considered the constitutionality of a jury's award of \$19,000 in actual damages and \$10,000,000 in punitive damages against the defendant. In this case the plaintiff brought a common-law slander of title action after the defendant acted in bad faith and attempted and advanced a claim based on an allegedly worthless quit claim deed, all in an effort to renegotiate an existing royalty arrangement. Based on the jury's award, the Court considered whether such a punitive damage award ratio of 526 to 1 violates the

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120. *Delta Drilling Co. v. Cruz*, 707 S.W.2d 660, 667 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

121. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *General Chem. Corp. v. Gonzalo de la Lastra*, 852 S.W.2d 916 (Tex. 1993), *cert. dismissed*, 114 S. Ct. 490 (1993); *General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 37 Tex. Sup. Ct. J. 176 (1993); *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. App.—El Paso 1991, writ denied).

122. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

123. *Id.* at 21.

124. *Id.* at 20.

125. 113 S. Ct. 2711 (1993).

due process clause of the Fourteenth Amendment and its holding in *Haslip*. The Court determined that the punitive damages award was reasonable and constitutional and stated that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."<sup>126</sup> After considering the specific facts of the case, the Supreme Court held that this award of punitive damages was not unreasonable. The dissent argued that no punitive damage award could be held unconstitutional under the Court's reasoning and holding.<sup>127</sup>

Texas has various procedural safeguards in force to ensure that the defendant's due process rights are not violated. For example, juries are instructed that exemplary damages mean "an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages."<sup>128</sup> Like the juries who decided *Haslip* and *TXO*, Texas juries are instructed as to the purpose and intent of punitive damages before they decide whether and in what amount to award.<sup>129</sup> Additionally, Texas courts analyze the punitive damages award based upon the five *Alamo* factors. The jury must arrive at a figure that is reasonably related in amount to the actual damage award based upon the *Alamo* factors.<sup>130</sup>

Moreover, the Texas legislature has imposed additional safeguards by capping punitive damage awards for gross negligence to four times actual damages or \$200,000, whichever is greater.<sup>131</sup> This cap was intended to ensure that the amount of punitive damages was rationally related to actual damages.

Since Texas law provides defendants with ample substantive and procedural protections to ensure that the jury does not exercise unbridled discretion and award unlimited damages, the Texas system operates within the confines of due process.<sup>132</sup> In *Zubiate* the El Paso Court of Appeals held that the jury's award of punitive damages did not violate due process because the jury had been effectively constrained and the defendant was protected by procedural safeguards of Texas law.<sup>133</sup> The court reasoned that the defendant's due process rights had been protected through the application of the *Alamo* factors.<sup>134</sup>

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126. *Id.* at 2722.

127. *Id.* at 2742.

128. P.J.C., *supra* note 19, § 7.06.

129. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

130. *Id.*

131. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon 1993).

132. See *General Chem. Corp. v. Gonzalo de la Lastra*, 852 S.W.2d 916 (Tex. 1993), *cert. dismissed*, 114 S. Ct. 490 (1993); *General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 7 Tex. Sup. Ct. J. 176 (1993); *State Farm Mutual Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. App.—El Paso 1991, writ denied).

133. *Zubiate*, 808 S.W.2d at 603 (citing *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1 (1991)).

134. *Zubiate*, 808 S.W.2d at 603-04; *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 927, 946 (Tex. App.—Corpus Christi 1992, writ denied) (punitive damage award did not violate the state or federal constitution because the jury was instructed as to its reason for impos-

In 1992, the Texas Supreme Court was again faced with determining the constitutionality of punitive damages.<sup>135</sup> The court, however, refused to pronounce method, means, manner, and amount of punitive damages as vague or violative of the defendant's rights to due process as guaranteed by Article I, § 19 of the Texas Constitution and the Fourteenth Amendment to the United States Constitution. Instead, it relied upon § 41.007 of the Texas Civil Practices and Remedies Code and reduced the amount of punitive damages because the award exceeded the statute's 4:1 ratio.<sup>136</sup>

Three significant punitive damage cases have recently or are currently pending before the Texas Supreme Court.<sup>137</sup> In these cases the court is considering whether the *Burk Royalty* standard still should be applied and whether the Texas or United States Constitutions were violated by the imposition of punitive damages.

In *Saenz* the court of appeals held that the Texas procedure for assessing punitive damages does not violate the United States Constitution. The court specifically explained that Texas procedure for awarding punitive damages tracks the common law method approved by the United States Supreme Court in *Haslip* and involves proper jury instructions concerning the objective of punitive damages.<sup>138</sup> Further, the court of appeals reviewed the evidence and determined the jury's award of punitive damages comported with the *Alamo* factors.<sup>139</sup> If the damages appear excessive, the defendant may object and present arguments in a motion for new trial, take an appeal of right, or take a discretionary appeal to the Supreme Court of Texas or the Supreme Court of the United States.<sup>140</sup> As a result, there was no constitutional violation.

Finally, the *Saenz* court rejected the argument that the assessment of punitive damages violated the Texas Constitution, Article I, § 19 and specifically held that: (1) punitive damages may be awarded based upon a preponderance of the evidence rather than a higher standard such as clear and convincing evidence; (2) admission of evidence of defendant's wealth is permitted in assessing punitive damages; and (3) the gross negligence standard is clearly defined and not unconstitutionally vague.<sup>141</sup> Although the

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ing punitive damages); *General Motors Corp. v. Saenz*, *supra*, note 113 (in addition to the *Alamo* factors, when reviewing a punitive damage award, the court may consider the frequency of the wrongs committed and the size of an award needed to deter similar wrongs in the future).

135. *General Chem. Corp.*, 852 S.W.2d 916 (Hecht, J., concurring and dissenting).

136. *Id.* at 580.

137. *General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 7 Tex. Sup. Ct. J. 176 (1993); *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144 (Tex. App.—El Paso 1991, writ granted); *Granite Constr. Co. v. Mendoza*, 816 S.W.2d 756 (Tex. App.—Dallas 1991, writ requested) (the court of appeals held that the jury was properly instructed and constrained, had given consideration to the proper factors as set forth in *Alamo*, and reached a verdict that was neither excessive nor unreasonably proportioned to actual damages).

138. *Saenz*, 829 S.W.2d at 241.

139. *Id.*

140. *Id.*

141. *Id.* at 248.

Texas Supreme Court granted points of error related to General Motors' duty to warn, it may decide other preserved issues such as the constitutionality of punitive damages under the state and federal constitutions.

These pending cases do not raise novel issues. In addressing the constitutionality of exemplary damages, the trend established by lower courts has been to follow guidelines set forth by both the United States Supreme Court and the Texas Supreme Court. However, the Texas Supreme Court may use these cases to modify the *Burk Royalty* standard and the constitutional analysis.

When addressing the excessive fines issue, the United States Supreme Court has held that the Eighth Amendment does not apply to punitive damage awards between private parties.<sup>142</sup> Under the Texas Constitution, lower courts have held that protection against excessive fines does not apply to an award of common-law punitive damages.<sup>143</sup>

The Texas Supreme Court has also addressed the constitutionality of civil penalties and excessive fines.<sup>144</sup> In *Pennington* the court held that a civil penalty is not unconstitutional or excessive unless it becomes "so manifestly violative of the constitutional inhibition as to shock the sense of mankind."<sup>145</sup> The *Pennington* court further explained that the analysis of possible excesses by the jury involves a determination of whether the amount was fixed with reference to the object it is to accomplish according to the seriousness of the wrong and the defendant's culpability.

Few courts have found punitive damage awards to be so excessive as to amount to a shock to the conscience. For example, the \$3 billion punitive damage award in *Texaco v. Pennzoil Co.* was reduced to \$1 billion on appeal, which apparently brought the judgment well within the Texas constitutional limits on excessive fines.<sup>146</sup> Multiple awards of punitive damages do not violate due process or equal protection.<sup>147</sup>

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142. *Browning-Ferris Indus. Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

143. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 208 (Tex. App.—Corpus Christi 1990, no writ).

144. *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980).

145. *Id.* (quoting *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951, 953 (1903)).

146. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.—Houston 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988) (the court noted that it reduced the award based upon the more restrictive New York law and implied that Texas law may not have required any remittitur); *see also* *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) (multiple punitive damage awards did not violate the Texas or United States Constitutions even if "Celotex's liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence"); *K-Mart Corp. v. Pearson*, 818 S.W.2d 410 (Tex. App.—Houston [1st Dist.] 1991, no writ) (a punitive damage award of \$2.2 million did not shock the sensibilities of mankind even though the total damage award constituted eighty percent of the defendant store owner's net worth).

147. *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (no constitutional violation occurred although the jury awarded punitive damages which were twenty times the actual compensatory damages), *cert. denied*, 112 S. Ct. 1778 (1992); *Fiberboard Corp. v. Pool*, 813 S.W.2d 658, 686-87 (Tex. App.—Texarkana 1991, writ denied) (multiple awards of punitive damages which jeopardize the financial stability of the company do not violate the substantive or procedural due process protections afforded by the United States and Texas Constitution), *cert. denied*, 113 S. Ct. 3037 (1993).

## D. TORT REFORM — UP TO THE CEILING AND BEYOND

Except for worker's compensation cases, an award of punitive damages is dependent first on the existence of an actual damage award.<sup>148</sup> Once that threshold has been crossed, the jury has discretion to award punitive damages in accordance with the trial court's instructions.<sup>149</sup>

The common law principles that guide courts in policing judgments for possible jury excesses are flexible and require no strict rules or ratios that limit recovery.<sup>150</sup> The ratio of punitive to actual damages will be considered only as one factor in the determination of reasonableness. The *Alamo* factors must be considered.<sup>151</sup>

The Texas legislature enacted a statutory cap limiting punitive damages, not predicated by a finding of malice or intentional conduct, to four times actual damages. Section 41.007 of the Texas Civil Practice & Remedies Code states:

41.007. Limitation on Amount of Recovery

Except as provided by Section 41.008, exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or \$200,000, whichever is greater.<sup>152</sup>

Applying § 41.007, the Texas Supreme Court recently reduced a punitive damages award that exceeded the four to one ratio limit.<sup>153</sup> On the other hand, § 41.008 of the Texas Civil Practice & Remedies Code expressly exempts the punitive damage cap for awards based upon malice or intentional conduct.<sup>154</sup> Although the term "intentional tort" is not statutorily defined, the legislative history indicates that there is no punitive damage cap "in factual scenarios where a product manufacturer makes an economic decision to the effect that it would be cheaper to pay off tort judgments than to take remedial or warning steps."<sup>155</sup> Unlike the term "intentional torts," the term "malice" is defined by the statute to mean "an act that is carried out by the

148. See *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712 (Tex. 1987) (in a worker's compensation case, punitive damages are available without a finding of actual damages); *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981) (a worker is entitled to punitive damages without a finding of actual damages). The legislature has codified that requirement to necessitate an actual damage award of more than a mere nominal amount. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (Vernon 1992).

149. *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981).

150. *Browning Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144, (Tex. App.—El Paso 1991, writ granted); *Alamo*, 616 S.W.2d at 910. The punitive damage award must be reasonable in relation to the amount of actual damages. *Alamo*, 616 S.W.2d at 910; see also *Tatum v. Preston Carter Co.*, 702 S.W.2d 186 (Tex. 1986).

151. *Alamo*, 616 S.W.2d at 910.

152. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1992).

153. *General Chem. Corp. v. Gonzalo de la Lastra*, 852 S.W.2d 916 (Tex. 1993), cert. dismissed, 114 S. Ct. 490 (1993).

154. *Transmission Exch. Inc. v. Long*, 821 S.W.2d 265 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (since fraud was successfully proven, the punitive damage cap did not apply and the award exceeding the four to one ratio was upheld); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1992).

155. Debate on Tex. S.B. 287 on the Floor of the Senate, 70th Leg., R.S. 28-30 (May 5, 1987).

defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage."<sup>156</sup> Thus, in product liability causes of action, such as asbestos or the much publicized Ford Pinto and GM saddle side gas tank cases, the cap on punitive damages does not apply. Although there is no cap on these cases, the jury's award must still comport with the trial court's instructions and the *Alamo* factors.<sup>157</sup>

If the facts support a finding that the tortfeasor acted intentionally or with malice, the plaintiff should plead the same and submit proof and jury questions. If the jury returns a punitive damage verdict exceeding the four to one ratio for an intentional tort or malicious conduct, the trial or appellate courts should not reduce the award so long as it is supported by the evidence and the defendant is afforded substantive and procedural protections.<sup>158</sup>

#### E. AWARDING DTPA PENALTIES AND PUNITIVE DAMAGES SIMULTANEOUSLY

In most product liability causes of action, the plaintiff will also have a claim for breach of the Texas Deceptive Trade Practices Act. The DTPA provides a laundry list of acts which constitute violations, including but not limited to, any conduct which is either false or has the capacity or tendency to mislead or deceive the ignorant, unthinking, and credulous,<sup>159</sup> and passing off goods or services as those of another.<sup>160</sup> Pursuant to the DTPA, it is unlawful for a person or entity to engage in conduct which is false, misleading, or deceptive whether or not it falls into the specifically enumerated sections contained in the statute's laundry list.<sup>161</sup> It is also unlawful to breach an express or implied warranty, to commit any unconscionable action or course of action by any person, or to violate article 21.21 of the Texas Insurance Code.<sup>162</sup> The Texas Deceptive Trade Practices Act authorizes the imposition of treble damages if the finder of fact determines that the person or company acted knowingly and engaged in false, misleading or deceptive acts or practices.<sup>163</sup>

Remedies authorized under the DTPA are *cumulative* of those provided

156. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(6)(B) (Vernon 1992).

157. *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

158. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 864-65 (Tex. App.—Houston, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988); *Hofer*, 679 S.W.2d at 471; *Alamo*, 616 S.W.2d at 908; *Burk Royalty Co.*, 616 S.W.2d at 920; *K-Mart Corp. v. Pearson*, 818 S.W.2d 410, 416-17 (Tex. App.—Houston [1st Dist.] 1991, no writ).

159. *Chrysler Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 705 (Tex. App.—San Antonio 1991, no writ).

160. *Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349, 354-55 (Tex. App.—San Antonio 1991, no writ) (finding that the standard, quality, grade, style, or model of the goods or services were not of the particular quality that they were represented to be); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1992).

161. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1992).

162. *Id.*

163. *Id.* § 17.50(b)(1).



by other laws.<sup>164</sup> In a claim involving product liability and DTPA allegations, the plaintiff may recover both statutory penalties and exemplary damages so long as the charge submitted contains separate and distinct damage questions to the jury on both the product defect and the false, misleading or deceptive act or practice.<sup>165</sup>

In order to preserve recovery under both the DTPA and common law punitive damages, the plaintiff must present separate and distinct questions as to whether multiple acts occurred and whether those acts were the producing cause of the plaintiff's damages.<sup>166</sup> Although the Texas Supreme Court refused to allow a plaintiff to recover both DTPA treble damages and punitive damages without a finding of separate and distinct acts and damages, the Court held that "where the prevailing party fails to elect between alternative measures of damages, the court should utilize the findings affording the greater recovery and render judgment accordingly."<sup>167</sup>

In short, the Texas Supreme Court has authorized the simultaneous imposition of punitive damages and DTPA statutory penalties on a finding that separate and distinct acts and damages occurred.<sup>168</sup> So long as there are separate findings under both the product liability theory and DTPA, both punitive and statutory penalties are recoverable.<sup>169</sup>

#### F. COMPARATIVE FAULT AND PUNITIVE DAMAGES

Punitive damages shall not be reduced proportionately to the percentage

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164. *Id.* § 17.43; *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985).

165. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987); *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dismissed) (the plaintiff may recover both statutory treble damages and exemplary damages based upon findings of fact of separate and distinct acts and damages); *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 744 (Tex. App.—Corpus Christi 1992, writ dismissed) (the plaintiff proved separate acts and damages to support his award of DTPA treble damages and punitive damages, thereby allowing recovery for both simultaneously); *Orkin Exterminating Co. v. Williamson*, 785 S.W. 905, 912-13 (Tex. App.—Austin 1990, writ denied) (awarding both exemplary damages and attorney's fees was proper even though the verdict did not include separate and distinct findings of actual damages upon which the awards could be predicated).

166. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987).

167. *Id.*; see *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 606 (Tex. App.—Tyler 1984, writ refused n.r.e.) (without separate and distinct finding, punitive damages and statutory penalties are predicated upon the same actual damages findings and would amount to a double recovery); see also *Mayo v. John Hancock Mut. Life Ins. Co. of Boston*, 711 S.W.2d 5, 6 (Tex. 1986). *But see Orkin Exterminating Co. v. Williamson*, 785 S.W.2d 905, 912-13 (Tex. App.—Austin 1990, writ denied) (award of exemplary damages and attorney's fees under the DTPA was proper even though the verdict did not include separate and distinct findings of actual damages upon which the awards could be predicated).

168. *Birchfield*, 747 S.W.2d at 367; *Mayo*, 711 S.W.2d at 6-7; TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon 1992) ("The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the same act or practice").

169. *Birchfield*, 747 S.W.2d at 367; *Berry Property Management*, 850 S.W.2d at 665; *Orkin*, 785 S.W.2d at 912-13.

of negligence attributed to the plaintiff.<sup>170</sup> In order to achieve the deterrent and punitive goals of exemplary damages, courts will not reduce the plaintiff's award by his own comparative fault. However, it is unlikely that courts will allow a plaintiff, who is found to be more than fifty percent negligent to recover punitive damages.<sup>171</sup>

### G. DISCOVERY AND ADMISSIBILITY OF NET WORTH

The Texas Supreme Court has repeatedly held that evidence of defendant's net worth is discoverable and admissible in cases involving punitive damages.<sup>172</sup> In order to achieve the dual goals of deterrence and punishment, the jury should consider the net worth of the defendant.<sup>173</sup> In addition, evidence of net worth is admissible to show that the company had the financial ability to provide proper facilities and/or equipment to prevent the plaintiff's injuries.<sup>174</sup>

## VI. WRONGFUL DEATH

### A. LIMITATIONS ON A DECEDENT'S HEIRS TO PROSECUTE A WRONGFUL DEATH ACTION

The Texas Supreme Court in *Russell v. Ingersoll-Rand Co.*<sup>175</sup> modified the statute of limitations for a decedent's heirs to prosecute a wrongful death action. The cornerstone of the holding was that wrongful death actions are derivative of the decedent's rights.<sup>176</sup> The court held that a wrongful death action exists only if the decedent, at the time of his death, could have

170. *Elbar, Inc. v. Claussen*, 774 S.W.2d 45, 53 (Tex. App.—Dallas 1989, writ dismissed) (since the purpose of awarding exemplary damages is not to compensate the plaintiff but to punish and set an example for others, exemplary damages should not be reduced proportionately to the percentage of negligence attributed to the plaintiff); *Turner v. Lone Star Indus., Inc.*, 733 S.W.2d 242, 242-43 (Tex. App.—Houston [1st Dist.] 1987, writ refused n.r.e.); *Olin Corp. v. Dyson*, 709 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1986, no writ).

171. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon 1992) (claimant is barred from recovering actual damages for negligence if the claimant is more than fifty percent negligent); *Id.* § 41.004(a) (punitive damages must be predicated upon a finding of actual, not nominal damages); see also *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1011-12 (5th Cir. 1986).

172. *Lunsford v. Morris*, 746 S.W.2d 471, 472 (Tex. 1988) (civil defendant's net worth is relevant to the issue of punitive damages, thereby making it discoverable and admissible); *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 927, 946 (Tex. App.—Corpus Christi 1992, writ granted) (since punitive damages are intended to punish and deter, evidence of net worth is admissible); *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 248 (Tex. App.—Corpus Christi 1991), *rev'd on other grounds*, 37 Tex. Sup. Ct. J. 176 (1993) (since one of the purposes of punitive damage awards is to deter future misconduct, evidence of net worth is relevant to determining the amount of such award); *Delgado v. Kitzman*, 793 S.W.2d 332 (Tex. App.—Houston [1st Dist.] 1990, no writ) (when the plaintiff alleges punitive damages, evidence of net worth is discoverable); *Hanna v. Meurer*, 769 S.W.2d 680, 681 (Tex. App.—Austin 1989, no writ).

173. *Lunsford*, 746 S.W.2d at 472 (the degree of punishment and deterrence resulting from the judgment is to some extent in proportion to the means of the guilty person); *RESTATEMENT (SECOND) OF TORTS* § 908 (cmt. e) (1977).

174. *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 366 (Tex. 1987).

175. 841 S.W.2d 343 (Tex. 1992).

176. *Id.* at 345.

brought suit for his own injuries. If no such right existed at the time of the decedent's death, no wrongful death action is available to the decedent's heirs.<sup>177</sup>

In *Russell* the decedent contracted a terminal disease from silica exposure in 1981. Russell filed suit for his injuries in 1982 against several defendants. In 1988, Russell amended and added various additional defendants. Shortly thereafter, Russell died. His heirs then brought suit in their individual and representative capacities for wrongful death and survival causes of action. In 1988, the district court granted summary judgment for the additional defendants based upon the statute of limitations because suit was filed more than two years after the decedent knew or should have known that he was injured. The Texas Supreme Court held that the decedent would be barred by the statute of limitations from suing the additional defendants. Likewise, those making derivative claims under the wrongful death and survival statutes are barred as well.<sup>178</sup> His heir and beneficiaries, however, could maintain their claims against all tortfeasors who were sued prior to 1983.

In a strong dissent, Justice Doggett pointed out that the majority's holdings would prejudice plaintiffs who die from lingering injuries and would in effect require a decedent's family to file a wrongful death suit *before* the decedent has died.<sup>179</sup> Additionally, he noted the inequities in holding that Russell's wrongful death and survival causes of action lapsed five years before his death.

#### B. LOSS CHANCE OF SURVIVAL

In *Kramer v. Lewisville Memorial Hospital*<sup>180</sup> the Texas Supreme Court decided to recognize a cause of action for loss of chance of survival when the adverse result probably would have occurred anyway. In *Kramer* a physician failed to timely diagnose the plaintiff's cervical cancer. The court held that the loss of chance of survival was not available because even with a proper diagnosis the plaintiff had less than a 50% chance of survival based upon reasonable medical probabilities. Further, the court found that the Wrongful Death Statute did not authorize a loss chance of survival action because: (1) The Act allows recovery only for injuries that cause death; and (2) The Act only authorizes claims for actions that *actually cause* death.<sup>181</sup> The court refused to recognize the loss of chance of survival as part of the common law, thereby refusing to recognize the action under the Survival Statute. The court held that the lost chance action was not viable because courts cannot reward a plaintiff until an ultimate harm occurs which would be death in this case.<sup>182</sup> The court said that by accepting the lost chance doctrine, the law would be rewarding plaintiffs when there is only a mere

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177. *Id.* at 348.

178. *Id.* at 345.

179. *Id.* at 352 (Doggett, J., dissenting).

180. 858 S.W.2d 397 (Tex. 1993).

181. *Id.* at 404.

182. *Id.* at 405.

possibility that a tortfeasor's negligence caused of the ultimate harm.<sup>183</sup>

## VII. EMOTIONAL DISTRESS

### A. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In *Boyles v. Kerr*<sup>184</sup> the Supreme Court of Texas held that Texas law does not recognize a cause of action for negligent infliction of emotional distress. In this case Boyles videotaped a sexual encounter with Kerr and showed the videotape around campus. At trial the jury awarded Ms. Kerr monetary damages and the court of appeals affirmed.<sup>185</sup> The Texas Supreme Court reversed and remanded the case for a new trial reasoning that Kerr could not recover based on the jury verdict because:

[t]he tort system can and does provide a remedy against those who engage in such conduct. But an independent cause of action for negligent infliction of emotional distress would encompass conduct far less outrageous than that involved here, and such a broad tort is not necessary to allow compensation in a truly egregious case such as this.<sup>186</sup>

*Boyles* overruled *St. Elizabeth Hospital v. Garrard*,<sup>187</sup> which recognized an independent right to recover for negligently inflicted emotional distress. The Texas Supreme Court further held that it was not limiting the right to recover mental anguish damages in other contexts such as a breach of another legal duty.<sup>188</sup>

In *Weirich v. Weirich*<sup>189</sup> a mother brought suit against the father and paternal grandmother of her children, based on their having allegedly kidnapped the children. Specifically, the suit was based on claims of intentional and negligent infliction of emotional distress, intentional and negligent interference with child custody, and for violations of the Family Code's child custody provisions. Based on the jury's findings, the trial court rendered judgment for the plaintiff in the amount of \$5,947,684.89.

On appeal, the court of appeals reversed and rendered a take nothing judgment.<sup>190</sup> The San Antonio Court of Appeals stated that "we agree that Texas does not recognize common law causes of action for negligent interference with family relationship or negligent infliction of emotional distress

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183. *Id.*

184. 855 S.W.2d 593 (Tex. 1993).

185. *Boyles v. Kerr*, 806 S.W.2d 255, 261 (Tex.App.—Texarkana 1991), *rev'd*, 855 S.W.2d 593 (Tex. 1993).

186. *Boyles*, 855 S.W.2d at 602. On rehearing, the Texas Supreme Court withdrew the original majority opinion and substituted one with the same holding. In the original opinion, the court held that "[t]ort law cannot and should not attempt to provide redress for every instance of rude, insensitive or distasteful behavior, even though it may result in hurt feelings, embarrassment, or even humiliation." See *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993). After much public outcry, this offensive language was omitted from the holding.

187. 730 S.W.2d 649 (Tex. 1987) (recognizing independent tort of negligent infliction of emotional distress).

188. *Boyles*, 855 S.W.2d at 594.

189. 833 S.W.2d 942 (Tex. 1992).

190. *Weirich v. Weirich*, 796 S.W.2d 513 (Tex. App.—San Antonio 1990), *rev'd*, 833 S.W.2d 942 (Tex. 1992).

within the context of the facts this case presents . . ."<sup>191</sup> Based on its understanding of Texas law, the court of appeals also held that "Texas does not recognize an independent cause of action for negligent infliction of emotional distress in the context of a child abduction case . . ."<sup>192</sup> The court of appeals did acknowledge that the intentional interference with the relationship of parent and child is actionable in the State of Texas.<sup>193</sup>

When the Texas Supreme Court reviewed this case, it did not focus on the above issues. Instead, the court addressed claims arising under the Family Code and, as a result, held that "we do not reach and express no opinion on the correctness of the court of appeals' writing on negligent infliction of emotional distress and negligent interference with a family relationship."<sup>194</sup>

## B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Twyman v. Twyman*<sup>195</sup> the Supreme Court of Texas decided whether a claim for the infliction of emotional distress could be brought in a divorce proceeding. In Ms. Twyman's divorce petition, she made a claim for emotional harm based on the allegation that her husband, William, "intentionally and cruelly attempted to engage her in deviate sexual acts."<sup>196</sup> At the conclusion of a bench trial, the court granted Ms. Twyman a divorce and awarded her \$15,000 for her claim of emotional distress.

The Texas Supreme Court acknowledged that it recently refused in *Boyles v. Kerr* to recognize the tort of negligent infliction of emotional distress. Regardless of the decision in *Boyles*, the supreme court stated that the broad nature of Ms. Twyman's claims for emotional distress might constitute a claim for intentional infliction of emotional distress.<sup>197</sup> The Texas Supreme Court adopted the tort of intentional infliction of emotional distress as contained in the Restatement (Second) of Torts Section 46 (1965): (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe.<sup>198</sup>

Texas became the forty-seventh state to recognize such an action.<sup>199</sup> Moreover, the court held that such a claim could be brought in a divorce proceeding.<sup>200</sup> As a result, the court reversed and remanded case to the trial court so that it could be determined whether the elements of intentional infliction of emotional distress were present.

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191. *Id.* at 515.

192. *Id.* at 516.

193. *Id.*

194. *Weirich*, 833 S.W.2d at 946. Note that this case was decided prior to the holding of *Boyles v. Kerr*.

195. 855 S.W.2d 619 (Tex. 1993).

196. *Id.* at 620.

197. *Id.* at 621.

198. *Id.*

199. *Id.* at 621-22.

200. *Id.* at 625.

### C. BYSTANDER RECOVERY FOR MENTAL ANGUISH

In *Garcia v. San Antonio Housing Authority*<sup>201</sup> the San Antonio Court of Appeals considered whether an uncle who witnessed his nephew's injury could recover for his own mental anguish as a bystander. The trial court granted summary judgment because the uncle had no standing to seek such recovery. The court of appeals held that: "neither a close personal relationship nor the uncle-nephew relationship without more is sufficient for recovery as a bystander. But we conclude that a relative residing in the injured person's household may recover as a bystander, and we therefore reverse the take-nothing summary judgment."<sup>202</sup>

The court adopted the bright line test whereby relatives residing in the same household as the victim will be considered as being closely related to the victim so as to allow them to potentially recover as a bystander.<sup>203</sup> Based on this holding, the court reversed and remanded to determine whether the uncle resided in the same household as the nephew.

### D. MENTAL ANGUISH DAMAGES

In *Pietila v. Crites*<sup>204</sup> the Supreme Court of Texas reviewed a medical malpractice action involving the negligent treatment of a pregnant automobile accident victim. The plaintiffs alleged that the defendant's negligent treatment resulted in the death of the plaintiffs' unborn child. The court of appeals held that parents have a common law negligence claim for damages based on the death of a fetus.<sup>205</sup> The Supreme Court of Texas reversed the judgment of the court of appeals and affirmed the summary judgment on behalf of the doctor. The court held that "mental anguish damages for the parents are not recoverable when the only asserted cause of action is negligence towards the fetus."<sup>206</sup> On the other hand, plaintiffs are entitled to bring a common-law claim to recover for their own mental anguish arising out of the treatment or injury of the mother "but they are precluded from bringing suit for their mental anguish arising out of the treatment or injury of their unborn child."<sup>207</sup>

## VIII. LIBEL AND SLANDER

### A. DEFAMATION AND INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

In *Schauer v. Memorial Care Systems*<sup>208</sup> an employee nurse brought suit against her employer hospital and her former supervisor based on libel, as well as intentional and negligent infliction of emotional distress. The plain-

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201. 859 S.W.2d 78 (Tex. App.—San Antonio 1993, n.w.h.).

202. *Id.* at 79.

203. *Id.* at 81.

204. 851 S.W.2d 185 (Tex. 1993).

205. *Id.*

206. *Id.* at 186.

207. *Id.*

208. 856 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

tiff alleged that the defendants made negative statements in her job review. The trial court granted summary judgment and the court of appeals affirmed. While reviewing the statements made in this nurse's evaluation, the court of appeals stated that the plaintiff had to show that the hospital "published defamatory matter about her in the appraisal, which injured or impeached her reputation."<sup>209</sup> Moreover, the court recognized that "[a] statement may be false, abusive, unpleasant, and objectionable to the plaintiff without being defamatory. . . . An expression of opinion is protected free speech . . . . The real question is whether the statement is an assertion of fact or opinion."<sup>210</sup> Within these parameters, the court agreed with the defendants' arguments that the statements in dispute were "truthful, permissible expressions of opinion, or alternatively, not capable of a defamatory meaning."<sup>211</sup> Furthermore, the court stated that:

Accusations or comments about an employee by her employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege . . . . The privilege is not lost, so long as one believes in the truth of the communication . . . . A communication loses its privilege if it was made with malice or want of good faith.<sup>212</sup>

Since the facts indicated that the communication was privileged and since no evidence of malice was offered, there was no actionable libel.<sup>213</sup>

The court next addressed the plaintiff's claim of intentional infliction of emotional distress. After reviewing the elements that must be present for such a claim, the court concluded that the conduct in this case could not be viewed as "outrageous."<sup>214</sup> Moreover, the plaintiff failed to offer any evidence indicating she suffered severe emotional distress. In light of the facts that the plaintiff's performance evaluation was given only to her immediate supervisor and that it was not made known to any of her co-workers, no such requisite outrageous conduct existed. Lastly, the facts simply did not support a claim of severe emotional distress.

## B. MALICE AND PUBLIC OFFICIALS

In *Johnson v. Southwestern Newspapers Corp.*<sup>215</sup> a high school football coach and his wife instigated a libel suit against a newspaper and sports writer. Essentially, this dispute arose after the defendants published an article critical of the plaintiff and his football team which claimed that the plaintiff's team generally engaged in unsportsmanlike conduct. Moreover, the article claimed that the plaintiff ignored the conduct of his players and as a result, many coaches felt the plaintiff was a detriment to high school athletics.

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209. *Id.* at 446.

210. *Id.* at 446-47.

211. *Id.* at 447.

212. *Id.* at 450.

213. *Id.*

214. *Id.* at 451.

215. 855 S.W.2d 182 (Tex. App.—Amarillo 1993, writ denied).

The trial court concluded that the plaintiff was a public official; therefore, a showing of actual malice was required. Finding no malice, the trial court granted summary judgment. After its own review of the facts, the Amarillo Court of Appeals affirmed summary judgment because the evidence established that the plaintiff was a public official due to his status as the school's athletic director and head football coach and the public responsibilities accompanying these two positions. Based on the plaintiff's "status as a public official and the fact that the Newspaper's article related to this official conduct . . . [the plaintiffs] cannot recover damages for a defamatory falsehood unless they prove the falsehood was made with actual malice, i.e., made with knowledge that it was false or with reckless disregard of whether it was false."<sup>216</sup> Based on this legal standard and the fact that the defendant had offered evidence to negate actual malice, the court felt there was no evidence to indicate "that the Newspaper made a false and defamatory statement of fact with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>217</sup>

## IX. INVASION OF PRIVACY

### A. ELEMENTS OF THE TORT OF INVASION OF PRIVACY

In *Valenzuela v. Aquino*<sup>218</sup> the Texas Supreme Court outlined the elements of the tort of invasion of privacy. In this case, the plaintiffs, Dr. Eduardo Aquino and his family, sued picketers who protested outside of their home. The defendants targeted Dr. Aquino's home to protest his performance of abortions. The plaintiffs based their action on the theories of negligent infliction of emotional distress and invasion of privacy. At the trial court, the plaintiffs were awarded damages and defendants were permanently enjoined from picketing within a certain distance of the plaintiffs' home. The court of appeals reversed the award of damages but affirmed the injunction.<sup>219</sup>

Based on the holding of *Boyles v. Kerr*<sup>220</sup> the Texas Supreme Court ruled that the trial court's judgment could not be sustained on a theory of negligent infliction of emotional distress. The court next reviewed the elements for invasion of privacy and held it occurs when: "(1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person."<sup>221</sup> Since the plaintiffs did not request that these invasion of privacy elements be submitted to the jury and the evidence did not conclusively establish the cause of action,<sup>222</sup> important factual issues were not resolved. As a result, no relief could be granted based on the theory of invasion of pri-

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216. *Id.* at 187 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

217. *Id.* at 188.

218. 853 S.W.2d 512 (Tex. 1993).

219. *Valenzuela v. Aquino*, 763 S.W.2d 43 (Tex. App.—Corpus Christi 1988), *aff'd in part and rev'd in part*, 853 S.W.2d 512 (Tex. 1993).

220. 855 S.W.2d 593 (Tex. 1993).

221. *Valenzuela*, 853 S.W.2d at 513.

222. *Id.*



vacy. Therefore, the Texas Supreme Court affirmed the court of appeals' decision to set aside the trial court's award of damages and remanded the case to the trial court for a new trial.<sup>223</sup>

## B. FIRST AMENDMENT PROTECTIONS

In *Anonsen v. Donahue*<sup>224</sup> the plaintiff brought an invasion of privacy suit after his grandmother revealed on national television that her husband had raped her daughter and the daughter gave birth to the plaintiff. During the program, the defendant did not reveal the name of her husband, daughter, or grandson. She, however, did reveal her own name. Due to such conduct, the plaintiff argued that his own identity had essentially been revealed as well, resulting in the general public's knowledge of this incestuous rape and the truth concerning his birth. The trial court granted summary judgment in favor of all defendants.

The Houston Court of Appeals affirmed the decision of the trial court and stated:

the protection of the individual must be balanced with the privilege of the press to give publicity to matters of public interest that arise out of the desire and the right of the public to know what is going on in the world and the freedom of the press and other information agencies to report it.<sup>225</sup>

Additionally, the court stated the plaintiff must prove the following elements to establish the tort of invasion of privacy: "(1) publicity was given to matters concerning the plaintiff's private life; (2) the matters made public would be highly offensive to a reasonable person of ordinary sensibilities; (3) the matters publicized were not of legitimate public concern."<sup>226</sup>

In arriving at its decision, the court focused on the third element required for a claim of invasion of privacy. When determining whether the publicized matter was of legitimate public concern, the court must determine whether such information is newsworthy and protected by the First Amendment. The court determined that the general subjects of incest and rape were in fact newsworthy and protected by the First Amendment.<sup>227</sup> Additionally, information about this rape and incest was not publicized by a third party but by a party actually involved and affected. An individual's personal story is his or hers to tell and "revelations of private facts about others involved in their lives . . . [are] protected by the First Amendment."<sup>228</sup> Additionally, the court stated that "we conclude that to allow a cause of action based upon . . . [this defendant's] truthful and undisguised account of her own and her family's experience is inconsistent with the First Amendment."<sup>229</sup>

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223. *Id.*

224. 857 S.W.2d 700 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

225. *Id.* at 702.

226. *Id.* at 703.

227. *Anonsen*, 857 S.W.2d at 704.

228. *Id.* at 706.

229. *Id.*

### C. FALSE LIGHT INVASION OF PRIVACY

In *Diamond Shamrock Refining v. Mendez*<sup>230</sup> an employee brought suit against his former employer based on allegations that the former employer had circulated information about the employee's termination. The employee alleged that his former employer's conduct constituted the torts of false light invasion of privacy and intentional infliction of emotional distress. At the trial court level, the jury rendered a verdict for the plaintiff on both theories of tort liability. The court of appeals affirmed the judgment based upon the false light theory but ruled there was no evidence to support the jury's verdict as to the claim for intentional infliction of emotional distress.<sup>231</sup>

Before addressing the specific elements of the tort of false light invasion of privacy, the Texas Supreme Court first stated that "[t]his court has never expressly held that a tort for false light invasion of privacy exists in Texas, although we have recognized that it is one of the four usual categories of private actions for invasion of privacy."<sup>232</sup> The court, however, refused to determine whether such a tort exists in Texas since this issue was not before the court. Rather, the court held that "if the tort of false light invasion of privacy exists in Texas, it requires a showing of actual malice as an element of recovery."<sup>233</sup> Therefore, based on the plaintiff's failure to establish this element of a claim for false light, the court reversed the decision of the court of appeals and remanded for a new trial.<sup>234</sup>

## X. GOVERNMENTAL LIABILITY

### A. NEW DEVELOPMENTS

In *Texas Department of Mental Health v. Petty*<sup>235</sup> the court considered the definition of tangible personal property within the meaning of the Texas Tort Claims Act. In this case a woman had been wrongfully institutionalized by state authorities for fifty-two years in the state's mental health system. The Texas Supreme Court held that the state is not immune from liability for misdiagnosis and mistreatment of an institutionalized patient.<sup>236</sup> A governmental entity may be liable for damages resulting from use and/or misuse of tangible personal property.<sup>237</sup> In this case Opal Petty was consistently misdiagnosed as mentally ill and mildly mentally retarded. The state conceded negligence but argued that no liability should flow from such negligence because the plaintiff was not injured through the use of any property. The state's argument failed to convince the court that the only way the

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230. 844 S.W.2d 198 (Tex. 1992).

231. *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 809 S.W.2d 514 (Tex. App.—San Antonio 1991), *aff'd in part and rev'd in part*, 844 S.W.2d 198 (Tex. 1992).

232. *Diamond Shamrock*, 844 S.W.2d at 200.

233. *Id.*

234. *Id.*

235. 848 S.W.2d 680 (Tex. 1992).

236. *Id.*

237. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1993); *Robinson v. Central Tex. MHMR Ctr.*, 780 S.W.2d 169, 170 (Tex. 1989) (use or misuse of tangible personal property includes non-use).

plaintiff could have been injured by her treatment records was if the paper actually impacted and injured her body.

The court based its holding on its prior unanimous decision in *Salcedo v. El Paso Hospital Dist.*<sup>238</sup> The *Salcedo* court held that the plaintiff could recover against a governmental physician who negligently interpreted readings from electrocardiograph equipment.<sup>239</sup> Misinterpreting the electrocardiograph documents amounted to a misuse of tangible personal property. Under the Texas Torts Claims Act, the plaintiff is not required to show that the physical property had injured decedent but rather, that its use, misuse, or nonuse caused injury.<sup>240</sup>

## B. IMMUNITY OF POLICE OFFICERS

In *Vasquez v. Hernandez*<sup>241</sup> the San Antonio Court of Appeals held that a police officer is protected by qualified immunity from liability arising from a suspect's death. In this case, a police officer responded to a "911" emergency call about a family disturbance which possibly involved a gun. Once the police officer arrived at the address, the suspect approached the police officer. Despite being ordered to stop and drop what appeared to be a gun, the suspect continued to approach the officer. As a result, the officer shot and killed the suspect. Later, it was determined that the object in the suspect's hand was a screwdriver and not a gun.

The police officer and the City of San Antonio filed motions for summary judgment. The motions, however, were denied by the trial court. On appeal, the court applied the following legal standards:

A police officer is entitled to qualified immunity if he is acting in good faith within the course and scope of his authority, and performing discretionary functions . . . . Discretionary actions are those which require personal deliberation, decision, and judgment, while ministerial actions require obedience to orders or performance of a duty as to which the actor is left no choice.<sup>242</sup>

The court reviewed expert testimony establishing that the officer was engaged in a discretionary act and had acted in a reasonable manner and in good faith. Moreover, the court acknowledged that "[g]overnment officers have a common law immunity from personal liability while performing discretionary duties in good faith within the scope of their authority."<sup>243</sup> Based on the legal standards, the evidence presented and the lack of controverting proof, the court reversed the denial of the motion for summary judgment as to the police officer.<sup>244</sup>

In the *City of Houston v. Newsom*<sup>245</sup> a bystander was injured by a stray

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238. 659 S.W.2d 30 (Tex. 1983).

239. *Id.*

240. *Id.*

241. 844 S.W.2d 802 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.).

242. *Id.* at 804.

243. *Id.* at 805.

244. *Id.* at 806.

245. 858 S.W.2d 14 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

bullet either during a shoot-out or after a police officer's gun accidentally discharged in an ensuing struggle. At the time, the officer was attempting to prevent an armed suspect from escaping. Subsequently, the plaintiff bystander alleged that the officers were negligent and failed to act with ordinary care under the circumstances. Also, he alleged that the city was negligent through the conduct of its employees.

The court of appeals explained that "[e]mployees of governmental entities are not subject to the waiver of immunity provided by the Texas Tort Claim Act to the extent that individual immunity from a tort claim exists."<sup>246</sup> The court next acknowledged that officials, like these police officers, "have a common-law immunity from personal liability while performing discretionary duties in good faith within the scope of their authority."<sup>247</sup> In addition, the court pointed out that "[a] plaintiff must defeat one or more of the elements of the affirmative defense of official immunity once the defendant establishes a prima facie case for its application."<sup>248</sup> Since the plaintiff failed to controvert any of these listed elements of official immunity, the court reversed the denial of summary judgment.<sup>249</sup>

In *Edgar v. Plummer*<sup>250</sup> the court of appeals addressed the issue of governmental immunity in regards to the detention of an automobile driver. In this case two police officers pulled over a motorist who was driving five miles an hour above the legal speed limit and who had crossed the right shoulder line. Although no speeding ticket was issued, the officers issued a written warning for the driver's failure to drive in a single lane. Based on the officer's conduct and the Department of Public Safety's investigation of this matter, the plaintiff filed suit for false arrest and for negligent investigation of the complaint he had filed against the officer. While determining that summary judgment was appropriate, the court explained:

An officer acts within the scope of his authority when he performs his official duties — in this case, the enforcement of the traffic laws. The fact that the officer's specific act that forms the basis of the suit may have been wrong or negligent does not mean he was acting outside the scope of his authority. . . . The enforcement of traffic regulations by peace officers involves the exercise of their discretion.<sup>251</sup>

In light of the evidence, "the stop and brief detention would not have been illegal, even if he had been mistaken."<sup>252</sup>

In *Boozier v. Hambrick*<sup>253</sup> a female airport police officer alleged that an airport superintendent grabbed her buttocks. The superintendent sued the airport officer for defamation, intentional infliction of emotional distress, and/or tortious interference with contract. Subsequent to the officer's report

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246. *Id.* at 17; see TEX. CIV. PRAC. & REM. CODE ANN. § 101.026 (Vernon 1993).

247. *Newsom*, 858 S.W.2d at 17.

248. *Id.* at 18.

249. *Id.*

250. 845 S.W.2d 452 (Tex. App.—Texarkana 1993, n.w.h.).

251. *Id.* at 453-54.

252. *Id.* at 454.

253. 846 S.W.2d 593 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

of this incident, the superintendent was convicted of assault. In determining whether the officer was entitled to summary judgment, the court considered whether her actions could be classified as quasi-judicial and whether she acted in good faith within her authority as a quasi-judicial employee. The Houston Court of Appeals determined that "[w]hen a police officer reports the misconduct of another to his or her superior . . . the officer performs a discretionary act."<sup>254</sup> Secondly, based on the summary judgment proof presented regarding the superintendent's conviction for assault, the superintendent could not challenge the truthfulness of the officer's allegation. Therefore, the plaintiff was estopped from denying the truthfulness of the defendant's allegations. Since the plaintiff failed to present controverting evidence of official immunity, summary judgment was proper.<sup>255</sup>

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254. *Id.* at 597.

255. *Id.* at 598.